Supreme Court, U.S.
FILED
MAY 30 1996
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(3)

No. 95-1760

In The

Supreme Court of the United States

October Term, 1995

International Brotherhood of Teamsters, AFL-CIO, Local No. 243,

Petitioner,

v.

National Labor Relations Board, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT MACOMB MALL ASSOCIATES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the National Labor Relations Board err as a matter of law when it interpreted *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) as barring nonemployee union representatives access to private property for purpose of consumer boycott handbilling, when the union failed to establish that it confronted unique obstacles to nontrespassory communications with the target audience?

LIST OF PARTIES TO THIS PROCEEDING

Petitioner, International Brotherhood of Teamsters, AFL-CIO, Local No. 243; *Petitioner,* United Food and Commercial Workers Local 880; *Respondent,* National Labor Relations Board; *Respondent,* Macomb Mall Associates; *Respondent,* Sears, Roebuck & Co.; *Respondent,* Oakland Mall Ltd.; *Respondent,* Chamber of Commerce of the United States of America.

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*Authorities upon which we chiefly rely are marked with asterisks.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 74 F.3d 292, and is reprinted in the separately-bound Appendix to the Petition (Pet. App. 1a-17a). The Supplemental Decision and Order of the National Labor Relations Board at issue in this matter is officially reported at 316 NLRB 1160, and is reprinted at Pet. App. 18a-67a. The original decision of the NLRB in this matter is officially reported at 304 NLRB 832, and is reprinted at Pet. App. 68a-80a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was issued on January 26, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) provides in pertinent part:

> [Sec. 8(a)] It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

STATEMENT OF THE CASE

Oakland Mall II[1] results from a number of attempts by agents representing Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American, AFL-CIO, ("Union"), to distribute handbills to customers entering a Sears, Roebuck and Co. ("Sears") store located adjacent to the Macomb Mall in Roseville, Michigan for the purpose of advocating a total consumer boycott of Sears. The Union alleges that Macomb Mall Associates, a Michigan Limited Partnership ("Macomb Mall"), violated Section 8(a)(1) of the National Labor Relations Act ("Act") by "interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act . . . "

In this case, Sears owned its property and, on at least two occasions, on or about August 9 and September 6, 1988, summoned Roseville police for assistance to remove Union representatives from Sears' entrances to its own store.

Upon being denied access to the Sears' entrances, on August 9, the Union agents moved to the interior of the Macomb Mall near the mall's entrance to Sears and began distributing handbills. Macomb Mall management, after learning about the activity, contacted Greg Lowran of the Union and explained that the proper procedures for access to the mall would have to be followed, as with any other requests, and that handbilling could not continue

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[1] U.S. Court of Appeals for the District of Columbia Circuit Case No. 95-1260 ("Oakland Mall II").

until the requirements were fulfilled.[2] Macomb Mall does not permit interim access while an application is pending.

Various conversations took place between the Macomb Mall management and Greg Lowran, who was in charge of the on-site activities of Local 243, regarding the application process. In fact, Lowran actually filled out two of the application forms (the registration application and the rules and regulations with respect to vending or solicitation or petitioning). However, the remaining documents were never completed, nor was proof of insurance coverage provided. At no time did the Union indicate particular problems with the application process, nor did

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[2] Macomb Mall allows all entities wishing to engage in non-consumer activity to apply for access, and it has a strong interest in the uniform enforcement of its policy. Various organizations make inquiries for access to the mall premises for vending, solicitation or petitioning. Mall management provides these entities with a packet of materials. The packet contains various documents, including an explanatory sheet regarding the mandatory insurance coverage, an "exhibit standards" form, a hold harmless and indemnification agreement, an event coordination list, a registration application, and rules and regulations with respect to vending, soliciting or petitioning. Additionally, Macomb Mall policy requires all groups to provide insurance coverage. The insurance coverage, generally accomplished by Macomb Mall's being named as an additional insured on the visiting organization's policy, assures protection for all potential damages that may result to third parties due to the activities of the visiting entity.

After the group has completed the necessary forms and provided proof of insurance, Macomb Mall schedules the event. Macomb Mall does not discriminate against any organization.

it state that any of the requirements posed an insurmountable or unreasonable barrier to its ability to comply.

On September 6, two men from the Union began distributing handbills at Macomb Mall's interior entrance to Sears with absolutely no prior notification to or consent by Macomb Mall management. A representative of Macomb Mall told the individuals that the handbilling would have to cease because the Union had not complied with the procedural requirements for solicitation on the mall premises. Again, the Union was provided with the packet of materials.

The Union handbillers subsequently left the mall premises. Thereafter, the Union filed the instant unfair labor practice charge against Macomb Mall and Sears.

Following a three-day hearing, an administrative law judge found that Sears and the Macomb Mall had violated the Act. In a decision issued August 27, 1991, the National Labor Relations Board ("Board"), applying the then-current test as set forth in *Jean Country*, 291 NLRB 11 (1988), affirmed the administrative law judge's decision.

Sears and the Macomb Mall filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit ("Court of Appeals") and the Board filed a cross-application for enforcement of its order. During this time period, this Court decided *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court ruled that the Board's *Jean Country* approach to resolving property access cases was not "consistent with" *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

Following *Lechmere*, the Court of Appeals, on joint motion of the parties, remanded this case to the Board for reconsideration in light of *Lechmere*. The Board, on remand, invited the parties in this case, as well as the parties in a number of other like cases that were remanded after *Lechmere*, to submit supplemental statements of position on the implications of *Lechmere*.

On January 25, 1995, the Board issued its decision in *Leslie Homes, Inc.*, 316 NLRB No. 29, *pet. for review pending sub nom. Metropolitan District Council of Carpenters v. NLRB*, No. 95-3086 (3rd Cir.) (Pet. App. 81a), the first post-*Lechmere* case to be decided by the Board. The Board ruled that *Lechmere* requires the Board to apply the rule in *Babcock* "outside the organizing context," 316 NLRB at 128, to cases in which union representatives seek to distribute handbills on private property for consumer boycott purposes.

Three months after deciding *Leslie Homes*, the Board issued its decision, *Oakland Mall II*, dismissing the complaint. On June 21, 1995, the Union filed a petition for review with the Court of Appeals.[3] The Union's petition was consolidated with a petition filed by Local 880 of the United Food and Commercial Workers, which sought to review another decision by the Board on facts similar to those in this case. On January 28, 1996, the Court of Appeals issued its decision in this matter affirming the

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[3] On August 16, 1995, the Court of Appeals granted the motions of Sears and Macomb Mall for leave to intervene, and the motion of the Chamber of Commerce of the United States of America for leave to participate as amicus curiae.

Board's application of *Lechmere* to these consolidated cases

On April 25, 1996, the Union filed its petition for a writ of certiorari before this Court, which was placed on the docket April 30, 1996.

SUMMARY OF ARGUMENT

The Board in this case properly applied this Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court reaffirmed its decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which generally serves to prohibit nonemployee access to private property for union organizing activity. The Board below held that *Lechmere* was not limited in scope to union organizing activity, and that nonemployees may not trespass onto private property to engage in union activity of any kind absent a showing of "unique obstacles" to nontrespassory communications, such as employees "isolated from the ordinary flow of information that characterizes our society." (Pet. App. 29a) (citing *Lechmere*, 502 U.S. at 540). The Court of Appeals correctly affirmed the Board's decision.

Had the Board applied a multifactor balancing approach to the issue of union access to private property, as set forth in *Jean Country*, 291 NLRB 11 (1988), the result would have been untenable. Property owners would be faced with a set of inconsistent guidelines requiring them to give greater access to union representatives implementing a consumer boycott than to union representatives seeking access for the purpose of helping non-

unionized workers to organize under the Act. As the Court of Appeals noted below, such a result would conflict with years of case law precedent:

> [A] long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of non-employees in organizing an employer's employees being somewhat weaker, and the interest of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still.

(Pet. App. 12a-13a) (Citations omitted). Given the overall purpose and structure of the Act, the Board's decision in this case to apply *Lechmere* to the issue of union access to private property for consumer boycott handbilling was correct.

Because the Court of Appeals affirmed the Board's decision denying relief to the Union, it is unnecessary for this Court to grant certiorari in this case. Macomb Mall requests, therefore, that this Court deny the Union's Petition for Writ of Certiorari in this matter.

ARGUMENT

I. Lechmere

The issue in this consolidated matter concerns the proper interpretation and application of the United States Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502

U.S. 527 (1992), including its application in cases involving union access to private property for a non-organizing purpose. This case concerns union access to private property for the purpose of consumer boycott handbilling. *Lechmere* was decided by the Supreme Court in 1992 following a variety of Board and federal court decisions concerning union access to private property.

In *Lechmere*, the Supreme Court reaffirmed the rule of *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956), which generally permits an employer to prohibit nonemployee distribution of union organizational literature on its property. (502 U.S. at 538). Pursuant to *Babcock*, nonemployee union organizers may be prohibited from entering private property unless "the accessibility of employees makes ineffective the reasonable attempts by [the] non-employees to communicate with them through the usual channels." (*Id.* at 537). "It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights. . . . " (*Id.* at 538). Under *Babcock*, the "union's burden of establishing such isolation is . . . 'a heavy one,' [cites omitted], and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication." (*Id.* at 540).

The Supreme Court in *Lechmere* addressed union organizers' attempt to gain access to a retail store located on private property in a large metropolitan area in an attempt to communicate with the employees of the store and organize them. Because the union in *Lechmere* failed to establish "unique obstacles" to communicating with the store's employees, who did not reside on the store's

premises, the Supreme Court held that their employer was entitled to prohibit the union from entering the premises. (*Id.* at 540).

In *Oakland Mall II*, the Board was faced with deciding, among other things, whether *Lechmere's* general rule prohibiting nonemployee access to private property applied to a union's attempt to gain access to Macomb Mall, a private shopping mall, for consumer boycott handbilling directed at the customers of Sears. The purpose of the handbilling was not related to union organizing attempts at Sears or anywhere else.

II. The Board's Decision in Oakland Mall II

For guidance in evaluating the rights of the union handbillers to gain access to the shopping centers in question, the Board in *Oakland Mall II* looked to *Lechmere*, as that decision had been interpreted by the Board in *Leslie Homes, Inc.* (Pet. App. 81a). The Board held as follows:

> On reconsideration of *Oakland Mall I* in light of *Lechmere*, the statements of position of the parties, the briefs of the amici curiae, and our recent decision in *Leslie Homes, Inc.*, we have decided to overrule certain of our unfair labor practice findings in *Oakland Mall I* and to dismiss those allegations against Respondents Sears and Macomb Mall.

(*Oakland Mall II*, Pet. App. 20a) (emphasis added). The Board's reliance on *Leslie Homes* in *Oakland Mall II* was significant to its decision in this matter because, in *Leslie Homes*, the Board also considered and rejected many of the arguments brought by the Union in the support of its Petition.

A. Leslie Homes

In *Leslie Homes,* the Board evaluated whether union representatives were authorized under § 7 of the Act to gain access to a new private condominium complex for the purpose of distributing handbills notifying potential purchasers of the fact that the condominiums had been built using non-union, allegedly sub-standard labor. Citing *Lechmere's* emphasis on the importance of property rights, its rejection of the multifactor balancing test of *Jean Country* and its unequivocal return to the rule in *Babcock,* the Board held that the union handbillers could be lawfully prohibited from entering the condominium complex. The Board held that the rule in *Babcock* was not limited in scope to situations involving nonemployee access to private property simply for organizing activities. (Pet. App. 81a). The Board reasoned that the Supreme Court's strong reaffirmation of the general rule of *Babcock* in *Lechmere* signaled that *Babcock* should continue to be applied outside the organizing context. (*Id.*)[4] Applying the *Lechmere/Babcock* analysis, the Board noted that "reasonable alternative means were available to the

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[4] Chairman Gould, who filed a concurring opinion in *Leslie Homes,* conceded that the decision in *Lechmere* was definitive insofar as it:

> creates no distinction and sends no 'signal' that union efforts to reach customers and the public ought to be treated differently from the [union organizing] initiatives undertaken in *Lechmere* itself. Under the circumstances of this case, the reasoning employed in *Lechmere* applies, and, therefore, I am required to join and concur in the opinion of Members Stephens and Cohen. If there is to be a different result, it must come from the President and the Congress and not the Board. (*Id.* at 131).

union for communicating its area standards message to potential customers of [the condominium complex] and, a fortiori, that it [had] failed to carry its burden of showing the absence of such means." (*Id.* at 131). Thus, the Board in *Leslie Homes* interpreted the *Lechmere/Babcock* rule as applying to nonemployee access to private property for area standards handbilling. (*Id.* at 127-28).

B. Oakland Mall II

In following *Leslie Homes*, the Board in *Oakland Mall II* found that the handbillers in this case were "non-employees" because they were neither employees of any of the employers whose property interests are at issue in this case nor employees with any rights to enter the property in the course of their employment under a sub-contract. (*Oakland Mall II*, Pet. App. 27a n.12).[5]

In concluding that the handbillers in this matter were nonemployees, the Board reasoned as follows:

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[5] The Board's conclusion regarding the status of the union handbillers in this case is especially appropriate with respect to Macomb Mall, whose relationship to the handbillers was almost non-existent. The handbillers were mostly former Ryder truck driver employees, who were terminated following Sears' decision to contract with a non-union trucking company. None of the handbillers had any employment relationship whatsoever with Macomb Mall, its tenants or Sears. The handbilling activity undertaken at the mall was simply aimed at convincing Sears' customers not to shop at Sears because of Sears' termination of the Ryder contract. To maximize their effectiveness, the handbillers wished to place themselves directly in front of the entrances to Sears, including the entrance to Sears inside of Macomb Mall.

> The fact remains that the Union represents no employees who have a present connection to any employer with an interest in the property or employees who have any claim to having been unlawfully terminated by such an employer. The *Lechmere/Babcock* general rule, as well as its inaccessibility exception, would indisputably apply were the Union to seek to organize the employees of Leaseway, who are now performing the work formerly contracted to Ryder. But the Union has expressed no such intent. Because Sears is a neutral with respect to the labor relations of independent contractors such as Leaseway and Ryder, pressure on Sears to cease doing business with Leaseway and recontract with Ryder is secondary pressure. *It would be anomalous to permit greater leeway respecting trespass for this kind of activity than for the primary activity of organizing a property owner's own employees.*

(*Oakland Mall II*, Pet. App. 27a n.13) (emphasis added). It is significant to note that the Board reached the same conclusion on this issue in *Leslie Homes*,[6] and that the Board in *Oakland Mall II* specifically relied on *Leslie Homes* in reaching its decision.[7]

III. The Court of Appeals' Decision in Oakland Mall II

The Court of Appeals reviewed and affirmed the Board's decision in *Oakland Mall II*. It reasoned in pertinent part:

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[6] *See Leslie Homes, Inc.*, Pet. App. 98a.

[7] *See Oakland Mall II*, Pet. App. 20a.

> At heart, this case is a simple one. *Babcock* establishes (and *Lechmere* reaffirms) a general rule under which an employer may deny access to nonemployees seeking to trespass on the employer's property. In the cases at hand, petitioners' activities involved the trespass of nonemployees onto employers' properties, in response to which the employers barred them access.
>
> No recognized right under section 7 has been shown to apply; therefore, the employers' actions were not unlawful under the NLRA. There should be no more to the matter than that. However, petitioners attempt to obfuscate this straightforward analysis by proffering artificial distinctions between the section 7 rights asserted in *Babcock* and *Lechmere,* and those being asserted here.

(Pet. App. 1a). The Court of Appeals found, "as have the other circuits that have considered the issue, that *Lechmere* does not create a distinction between the strengths of derivative and nonderivative section 7 rights." (*Id.* at 14a) (Citations omitted). Rejecting the Union's arguments, the Court of Appeals reasoned as follows:

> Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees. *A long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of nonemployees in organizing an employer's employees being somewhat weaker, and the interest of uninvited*

> *visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still.* Thus, "[u]nder the § 7 hierarchy of protected activity imposed by the Supreme Court," nonemployee activity in which "the targeted audience was not [an employer's] employees but its customers" "warrants even *less* protection than the non-employee organizational activity."

(Pet. App. 12a-13a) (Citations omitted). The Court of Appeals held that, "although *Babcock* and *Lechmere* were organizational cases, the reasoning therein is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group." (*Id.* at 15a) (Citation omitted).

Applying the rule in *Lechmere/Babcock* to this case, the Court of Appeals completed its analysis by noting that the Union had not satisfied its "heavy burden" of establishing the inaccessibility of its target group from nontrespassory methods of communication, and thus was not entitled to access to the shopping center properties for purposes of its consumer boycott handbilling. (*Id.* at 17a).[8]

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[8] This finding in *Oakland Mall II* was especially appropriate with respect to Macomb Mall, which is in a unique factual situation in comparison to the other parties in this matter. Even if it had attempted to do so, the General Counsel would have had a difficult time showing the union lacked reasonable alternative means for communicating its message to the customers of Sears without trespassing on Macomb Mall's property. Indeed, the record shows that Sears – which owned its building adjacent to Macomb Mall – had seven exterior entrances to its store through which approximately 80% of Sears' customers entered (*Oakland Mall II*, Pet. App. 22a-23a).

The Board's application of the rule in *Babcock* to this consumer boycott handbilling case, as affirmed by the Court of Appeals, is correct as a matter of law. It should, therefore, not be reviewed by this Court.

IV. The Jean Country Multifactor Balancing Approach was Rejected by this Court in Lechmere

By opposing the application of the *Babcock* rule to this case, the Union is attempting to resuscitate the multifactor balancing method of governing union access to private property that was put to rest by this Court in *Lechmere*.[9] In *Lechmere*, this Court declared in pertinent part:

> Hudgens did not purport to modify *Babcock*, much less to alter it fundamentally in the way *Jean Country* suggests. . . .
>
> So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in the Hudgens dictum. (Citations omitted). At least as applied

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[9] In many ways, the Union's Petition is surprising, given its admission that *Lechmere* announced a return to the straightforward approach announced in *Babcock*. *See Petition*, at 15 ("In *Lechmere*, the Court provided an entirely new synthesis of its decisions mediating the conflict between NLRA § 7 and state property law – one which eschewed the balancing test of prior opinions and substituted a categorical rule. . . . ")

> to nonemployees, *Jean Country* impermissibly conflates these two stages of the inquiry – thereby significantly eroding *Babcock*'s general rule that "an employer may validly post his property against nonemployee distribution of union literature." (Citation omitted). We reaffirm that general rule today, and reject the Board's attempt to recast it as a multifactor balancing test.

(117 L. Ed. 2d 92). The Union's Petition in this case must be rejected, because it calls for the Court to apply the *Jean Country* multifactor balancing test that was rejected by this Court in *Lechmere*. To find otherwise would potentially bring about what the Court of Appeals has deemed a "perverse" result,[10] in which union representatives seeking access to private property to organize workers would be governed by a rule (*Lechmere*) that is more restrictive than the rule (*Jean Country*) that would apply to union representatives seeking access to private property for other non-organizational purposes, including consumer boycott handbilling. Such a result is inconsistent with the Act.

In sum, *Lechmere* rejected the balancing approach to property rights set forth in *Jean Country*, and a return to this approach is unwarranted.

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[10] Pet. App. 16a.

V. The Rule in Lechmere/Babcock is Especially Appropriate With Respect to Macomb Mall

It is important to point out to this Court that the Board's application of the *Lechmere/Babcock* rule to Macomb Mall is especially appropriate given the attenuated nature of Macomb Mall's connection to the underlying labor dispute – neither Macomb Mall, nor its tenants or Sears (which owns its building adjacent to the mall), have any relationship whatsoever with the union that sponsored the handbilling activity. Even more importantly, unlike Sears, Macomb Mall never even prohibited the union from handbilling on its property. It simply required of the handbillers what it requires of all solicitors visiting the mall: (1) a completed application describing the proposed activity; (2) an executed "Hold Harmless and Indemnification Agreement;" (3) an executed agreement to abide by the rules established by Macomb Mall for such activities; and (4) a certificate of insurance similar to that required of the mall's commercial tenants establishing that the mall had been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. (*Oakland Mall II*, Pet. App. 23a). Given the unique factual position of Macomb Mall in this matter, The Board's decision in this matter was especially appropriate.

Macomb Mall was permitted under the law to reasonably and without discrimination restrict the Union's handbilling activity by insisting that the Union comply with the mall's solicitation/access policy.[11] Since Macomb

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[11] *Cf. McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 547 (8th Cir. 1973) (employer can interfere with the distribution of

Mall's solicitation/access policy was based on important interests, including safety considerations, and was reasonably applied to the Union without discrimination, the Board's decision that the Union was not entitled to access was appropriate, and should not be reviewed by this Court.

CONCLUSION

For all of the above reasons, Macomb Mall requests that this Court deny the Union's Petition for a Writ of Certiorari in this matter.

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union literature to the extent necessary to maintain production, discipline, security or other important interests); *NLRB v. Malta Construction Co.*, 806 F.2d 1009, 1011 (11th Cir. 1986) (interference with union activity may be justified based on special circumstances to maintain production or discipline or to ensure safety); *All-Glass Aquarium Co. Inc. v. NLRB*, 214 NLRB No. 24 (1974) (access rule is valid if it is not disparately applied against union activities).